UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN GARCIA,

Plaintiff,

v.

COURTESY FORD, INC. and GIG HARBOR FORD, INC.,

Defendants.

Case No. C06-855RSL

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendants' "Motion for Summary Judgment" (Dkt. #50) and plaintiff Susan Garcia's "Cross-Motion for Partial Summary Judgment" (Dkt. #59).[1] Plaintiff has asserted claims of (1) gender and pregnancy discrimination under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination ("WLAD"), (2) disability discrimination under the WLAD, and (3) unlawful interference with her benefits under the Family and Medical Leave Act ("FMLA"). Defendants, Courtesy Ford and Gig Harbor

[1] Because this matter can be decided on the memoranda, declarations, and exhibits submitted by the parties, plaintiff's request for oral argument is DENIED.

Ford, move for summary judgment on all of plaintiff's claims. Plaintiff cross-moves for summary judgment to establish that defendants acted as a single or joint employer.

II. FACTUAL BACKGROUND

Defendants Gig Harbor Ford and Courtesy Ford are separate corporate entities, though both are owned by members of the Hern family,[2] and both operate under the banner of Courtesy Auto Group. At the time of plaintiff's termination, Rick Hern served as Vice-President of both dealerships. He now is the President of both dealerships.

Plaintiff began working at Courtesy Ford as a Finance and Insurance Manager ("F&I Manager") in early 1998 and transferred to Gig Harbor Ford in 2001. She had her first child in August 2002 and subsequently took a leave of absence under the FMLA. She was later granted disability and extended leave as a result of complications that arose from her pregnancy, and returned to work on February 4, 2003. In late 2004, plaintiff began informing co-workers that she was attempting to become pregnant again. In December 2004, plaintiff did in fact become pregnant for the second time. She was terminated on January 14, 2005 by Gig Harbor Ford General Manager Graham Denny. The reasons for her termination are the focus of the claims in this case.

Defendants argue that plaintiff's termination was the result of her ongoing failure to collect purchase disclosure forms (commonly referred to as "kiss sheets") and testimonial sheets from customers. Kiss sheets serve two purposes at Gig Harbor Ford. First, they require the F&I manager to restate many of the legal rights of the customer and document in writing that the customer was in fact informed of these rights. Second, they contain a marketing questionnaire, which assists management in assessing the value of various marketing and advertising efforts. The testimonial sheet asks customers to describe their overall experience with the dealership.

[2] Courtesy Ford is owned by John Hern, his wife Terry Hern, and his son, John "Rick" Hern. John Hern is the sole owner of Gig Harbor Ford.

Defendants maintain that plaintiff was verbally warned of the importance of completing such forms on multiple occasions throughout 2004, but that these warnings went unheaded.

Plaintiff contends that she was terminated due to her pregnancy and that defendants' explanation for her termination is mere pretext. In support of this argument, she draws attention to the timing of her termination, which came a short time after she became pregnant and within two months of when Denny admits he became aware of her plans to become pregnant. She also points to the fact that her performance at the time of her termination, as measured by the amount of "dollars per vehicle" that she was producing, was superior to that of the only other F&I manager at Gig Harbor Ford, Marvin Smith. Plaintiff never received any written warnings regarding her failure to produce kiss sheets or testimonials prior to her termination and was subject to no other disciplinary actions in her seven years working for defendants. She contends that the only credible explanation for her termination in light of these facts is that defendants chose to terminate her so that they could hire a full time F&I manager and avoid having to provide her with FMLA leave.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" and a fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence is viewed in the light most favorable to the non-moving party. Id. "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor," Triton Energy Corp. v. Square D Co., 68

F.3d 1216, 1221 (9th Cir. 1995), or where there is a "complete failure of proof concerning an essential element of the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Trinton Energy Corp., 68 F.3d at 1221.

B. Pregnancy Discrimination

Plaintiff's pregnancy discrimination claims are analyzed under the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 658-59 (9th Cir. 2002).[3] Under that framework, plaintiff must first make out a *prima facie* case of unlawful employment discrimination by demonstrating that (1) she is a member of a protected class, (2) she was qualified for the position she held, (3) she suffered an adverse employment action, and that (4) her position was filled by a man. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002) (citing McDonnell Douglas, 411 U.S. at 802).

If plaintiff is successful in establishing a *prima facie* case, the burden shifts to defendants "to articulate a legitimate nondiscriminatory reason for [their] employment decision." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), as amended, 784 F.2d 1407 (9th Cir. 1986)). If defendants are able to rebut the presumption of discrimination raised by the *prima facie* showing, plaintiff must then demonstrate that defendants' articulated reason is a pretext for unlawful discrimination. Aragon, 292 F.3d at 658.

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[3] Washington courts also utilize the McDonnell Douglas framework in analyzing discrimination claims under RCW 49.60 in the summary judgment context. See Kuest v. Regent Assisted Living, Inc., 111 Wn. App. 36, 43-44 (2002); see also Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1094-95 n. 4 (9th Cir. 2005) ("Washington's employment discrimination law largely parallels federal law under Title VII, and our treatment of Coghlan's Title VII claim thus applies also to his similar claim under Washington law."). As such, the Court combines the two inquires in this order.

1. *Prima Facie* Case

"The requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of a doubt." Wallis, 26 F.3d at 889. Defendants do not challenge the fact that plaintiff was fired or that she was replaced by a male (thus satisfying the third and forth elements of plaintiff's *prima facie* case), but rather challenge the sufficiency of plaintiff's proof regarding the first two elements of her *prima facie* case. The Court finds that plaintiff has established a *prima facie* case that her termination was due to her pregnancy.

Defendants argue that plaintiff's *prima facie* case must fail because she has not established that Denny was aware of her pregnancy at the time she was terminated. Denny did, however, know that plaintiff was attempting to get pregnant. See Declaration of John B. Crosetto ("Crosetto Decl.") (Dkt. #59), Ex. E. For the purposes of establishing a *prima facie* case, such knowledge is sufficient to establish that plaintiff is a member of the protected class. See Cleese v. Hewlett Packard Co., 911 F. Supp 1312, 1317-18 (D. Or. 1995) (extending Title VII protection to intent to become pregnant); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1401 (N.D. Ill. 1994). As the court in Cleese explained, a claim of pregnancy discrimination under Title VII

> requires that the employer discriminate against the employee *because of* her pregnancy. It seems to this court that if the employer has the requisite intent to discriminate against an employee because she is currently pregnant or is planning to become so in the near future, it does not matter if she actually physically conceived at the time of the discrimination.

911 F. Supp. at 1318 (emphasis in original). Washington courts have found that the WLAD also extends to women attempting to become pregnant. Kuest, 111 Wn. App. at 43. Regardless of whether Denny was aware that plaintiff was actually pregnant at the time of her termination, his knowledge of her attempt to become pregnant is sufficient to establish that she was a member of a protected class.

Defendants also contend that plaintiff has failed to make out a *prima facie* case because she has not "eliminat[ed] *the possibility* that the failure to perform was the reason" for her dismissal. Reply at p. 4 (emphasis in original). In Aragon, however, the Ninth Circuit explicitly rejected the contention that a plaintiff must "eliminate the possibility" that he or she was fired for performance reasons in order to make a *prima facie* case. 292 F.3d at 659. Here, as in Aragon, plaintiff has presented evidence that she has not received any formal write-ups for poor performance or been subject to any disciplinary actions in her seven years of employment with defendants. See id. She has also put forward evidence that indicates that she received favorable feedback on her job performance in the months and years prior to her termination and that other employees, including supervisors, have attested to the quality of her work and her work ethic. Defendants' arguments regarding plaintiff's failure to provide kiss sheets are best left for the pretext stage of the analysis. Id. Plaintiff has met her minimal burden of establishing that she was qualified for her job as a F&I manager.

2. Pretext

Because defendants have offered a legitimate, nondiscriminatory reason for plaintiff's termination – that plaintiff was terminated for her consistent failure to provide management with purchase disclosure and testimonial forms – the Court must determine whether plaintiff can demonstrate that defendants' proffered explanation is pretext for unlawful discrimination. She can do so "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). When a plaintiff attempts to prove pretext with circumstantial evidence, as is the case here, she must do so with "specific" and "substantial" evidence "that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." Godwin

v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998).

The strongest evidence of pretext concerns the timing of plaintiff's termination. "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." Bell v. Clackamas County, 341 F.3d 858, 865-66 (9th Cir. 2003). Here, Denny acknowledges that he was aware that plaintiff was attempting to become pregnant in "late 2004." Crosetto Decl., Ex. A. Denny and Hern indicate that this was the same period that they began discussing plaintiff's termination. Though plaintiff was fired on January 14, 2005, Hern acknowledges that he instructed Denny in early December 2004 to wait until after the Christmas season to fire plaintiff. Interpreting the facts in the light most favorable to the non-moving party, Denny became aware of plaintiff's intention to become pregnant at approximately the same time that the decision was made to terminate her employment. The proximity between plaintiff's termination and Denny's acquisition of knowledge of plaintiff's pregnancy plans is sufficient on its own to defeat defendants' motion for summary judgment. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (sufficient question of employer intent raised in retaliation claim under Title VII where adverse actions occurred less than three months after compliant was filed and less than two months after investigation ended); Cleese, 911 F. Supp at 1319-20 (two month gap between employer becoming aware of plaintiff's pregnancy and her termination was sufficient to create question of fact regarding employer's intent).

Questions related to the timing of plaintiff's termination are accentuated by the lack of formal written warnings regarding plaintiff's failure to produce kiss sheets or testimonials and other evidence which indicates that her job performance was generally regarded as otherwise strong. In addition, the record reveals inconsistencies in defendants' version of events surrounding plaintiff's termination. Denny, for instance, indicated in his EEOC statement that he terminated plaintiff in January 2005 after reviewing sales records and discovering that the

number of kiss sheets and testimonials produced by plaintiff was significantly less than those produced by Marvin Smith. Crosetto Decl., Ex. U. He also maintained that he was the only person involved in the decision to terminate plaintiff. Id. These claims run contrary to Denny and Hern's deposition testimony, which indicates that Hern was involved in the decision to terminate plaintiff and that the two discussed plaintiff's termination on multiple occasions prior to Denny's comparison of plaintiff's and Smith's kiss sheet production in January 2005. While these inconsistencies may in fact be innocent and not indicative of pretext, when read together with the other facts discussed above, they raise questions about defendants' intent that are more appropriately resolved by a trier of fact. As the Ninth Circuit has explained, "very little evidence" is required to survive summary judgment in discrimination cases such as this because an employer's motive is difficult to ascertain, and that "without a searching inquiry into these motives" by a fact finder, "those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations.'" Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1072-73 (9th Cir. 2004) (quoting Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1111 (9th Cir. 1991)). Defendants' motion for summary judgment is denied with regard to plaintiff's claims for pregnancy discrimination under Title VII and the WLAD.

C. Other Discrimination Claims

1. Gender Discrimination

Defendant also moves for summary judgment on plaintiff's sex discrimination claims on the ground that they are identical to plaintiff's pregnancy discrimination claims. The Court agrees. Both federal law and state law treat pregnancy discrimination as a form of sex discrimination. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) ("for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"); WAC 162-30-020 (regarding WLAD). Plaintiff has not alleged any facts to support a claim that defendants discriminated against her for gender-based

reasons unrelated to her pregnancy. As such, defendants' motion for summary judgment on plaintiff's non-pregnancy related sex discrimination claims is granted.

2. Disability Discrimination

The Court also grants defendants' motion for summary judgment on plaintiff's disability discrimination claim under the WLAD. "[P]regnancy and pregnancy related conditions are not considered 'disabilities' under Washington law." Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 563 (2006).

3. Interference with FMLA Rights

Plaintiff did not respond to defendants' motion for summary judgment regarding her FMLA claim. Because there is no genuine issue of material fact, defendants' are entitled to judgment as a matter of law on this claim .

D. Courtesy Ford's Potential Liability

Plaintiff cross moves for summary judgment to establish that Courtesy Ford and Gig Harbor Ford constitute a "single employer" for the purposes of Title VII and that both are therefore subject to liability. Plaintiff misstates the relevant legal inquiry on this question. The four-part test identified by plaintiff for determining whether two entities constitute a "single employer" is not used to "determine joint liability . . . but instead determines whether a defendant can meet the statutory criteria of an 'employer' for Title VII applicability." Anderson v. Pacific Maritime Ass'n, 336 F.3d 924, 928-29 (9th Cir. 2003).[4] Here, Gig Harbor Ford does not dispute that it has at least 15 employees. Because Gig Harbor Ford's status as an "employer" for Title VII purposes is undisputed, the integrated enterprise test is inapplicable.

[4] Another district court recently explained the proper application of the integrated employer test as follows: "[a] plaintiff with an otherwise cognizable Title VII claim against an employer with less than 15 employees may assert that the employer is so interconnected with another employer that the two form an integrated enterprise and that collectively this enterprise meets the 15-employee minimum standard." Nowick v. Gammell, 351 F. Supp. 1025, 1034 n. 27 (D. Hawaii 2004).

See id. at 929.

It is also undisputed that Gig Harbor Ford and Courtesy Ford are separate corporate entities and that plaintiff was an employee of Gig Harbor Ford at the time she was discharged. Therefore, the relevant question here is whether Courtesy Ford is subject to either indirect employer or joint employer liability. See EEOC v. Pac. Mar. Ass'n, 351 F.3d 1270, 1273-74 (9th Cir. 2003). "Liability as an indirect employer requires that the employer have 'some peculiar control over the employee's relationship with the direct employer' and that the indirect employer engaged in 'discriminatory 'interference.'" Id. at 1274 (quoting Anderson, 336 F.3d at 932). Plaintiff has alleged only one link between Courtesy Ford and the termination of plaintiff, and that is the involvement of Rick Hern. Though Hern was indeed the Vice President of Courtesy Ford, he was also the Vice President of Gig Harbor Ford, which is presumably the role he was acting in when he discussed the termination of plaintiff with Denny. This link is insufficient to establish any sort of interference with plaintiff's employment by Courtesy Ford. Because plaintiff has produced no evidence to support the contention that Courtesy Ford was "the entity performing the discriminatory act," Courtesy Ford cannot be held liable as an indirect employer. See Pac. Mar. Ass'n, 351 F.3d at 1274; see also Anderson, 336 F.3d at 931.

Courtesy Ford could nevertheless still be subject to joint employer liability if both Courtesy Ford and Gig Harbor Ford "control the terms and conditions of employment of the employee."[5] Pac. Mar. Ass'n, 351 F.3d at 1275. The Ninth Circuit has stated that the "*sine qua non*" of determining whether an entity is a joint employer is whether the entity has "the right to hire, supervise and fire employees." Id. at 1277. The Tenth Circuit, in a case cited favorably by the Ninth Circuit in Pacific Maritime Association, has characterized joint employers as those who "share or co-determine those matters governing the essential terms and conditions of

[5] Both parties incorrectly use the terms "joint employer" and "single employer" interchangeably throughout their summary judgment memoranda.

employment." Bristol v. Bd. of County Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002).

Though defendants originally moved for summary judgment to dismiss Courtesy Ford, they concede in their reply memorandum that summary judgment on that question is inappropriate at this time:

> Defendants also moved for summary judgment as to Courtesy Ford's role as a proper party defendant. In reviewing plaintiff's materials, defendants believe that plaintiff has raised a genuine issue of material fact as to whether Courtesy Ford may be treated as a single employer for purposes of discrimination law and that the matter should be properly determined at trial.

Reply at p. 9. The Court agrees. Plaintiff has put forward substantial evidence indicating that there is significant cooperation, interaction and collaboration between the two corporations on matters of employment policy and performance tracking. That said, there are still significant questions of disputed fact regarding the exact role that Courtesy Ford plays in personnel decisions at Gig Harbor Ford, particularly as that role relates to this case. Denny, for instance, maintains that he was solely responsible for personnel decisions at Gig Harbor Ford. Because the determination of joint employment is a fact based inquiry, it is a question best resolved by the trier of fact. Both parties' motions for summary judgment on the question of Courtesy Ford's status as a joint employer are therefore denied.

IV. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment (Dkt. #50) is DENIED IN PART and GRANTED IN PART. Plaintiff's cross-motion for summary judgment (Dkt. #59) is DENIED.

DATED this 20th day of April, 2007.

Robert S. Lasnik
United States District Judge